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# TRIAL PRACTICE IN MISSOURI\*

CARL C. WHEATON\*\*

## I. PLEADINGS

### A. *Petitions*

#### 1. Sufficiency

The sufficiency of a petition to state a claim upon which relief can be granted must be determined from the facts stated therein.<sup>1</sup>

#### 2. Inconsistency

Claims based upon negligence and reckless and wanton acts are inconsistent and are improperly united in the same count; however, where no motion to elect or no motion to dismiss for failure to state a claim upon which relief can be granted is filed by the defendant, who instead files an answer, the irregularity is waived.<sup>2</sup>

### B. *Answers*

#### 1. Requirement and Waiver

The statutory provision requiring an answer is mandatory,<sup>3</sup> but the enforcement of this provision is waived unless the opposing party invokes the enforcement by timely and proper action.

Thus, where a wife raises no objection to her husband's failure to file an answer to her cross bill for separate maintenance on the ground of desertion and makes no objection to the procedure followed by the court at the time of trial, she waives the filing of an answer. Thereafter she cannot successfully complain, on appeal from the dismissal of her cross bill, that evidence of indignities offered by her husband, while properly admissible in support of his petition for divorce, had not been admissible

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\*This Article contains a discussion of selected 1958 and 1959 Missouri court decisions relating to interpretations of the new General Code for Civil Procedure and relevant Rules of the Supreme Court, with the exception of material bearing upon appellate procedure which is covered elsewhere in the *Review*.

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1. *Klorner v. Nunn*, 318 S.W.2d 241 (Mo. 1958).

2. *Eoff v. Senter*, 317 S.W.2d 666 (St. L. Ct. App. 1958).

3. § 509.010, RSMo 1949.

as matters of defense to her cross bill since her husband had been in default for want of an answer to the cross bill.<sup>4</sup>

## 2. Counterclaims

### a. The Prayer

The mere absence of a prayer in a counterclaim which is otherwise sufficient is not a fatal defect, although such a prayer, when present, conveys the intention of the pleader.<sup>5</sup>

### b. Compulsory Counterclaims

The purpose of the compulsory counterclaim statute<sup>6</sup> is to discourage separate litigations covering the same subject matter and to require their adjudication in the same action. It is a means of bringing all logically related claims into a single litigation through the penalty of precluding the later assertion of omitted claims.<sup>7</sup>

Where a subdivider's suit for the breach of an oral contract for sodding was brought in the circuit court of Jackson County at Kansas City, the compulsory counterclaim statute was applicable to the defendant landscapers who subsequently filed a mechanic's lien suit in the circuit court of Jackson County at Independence.<sup>8</sup>

## C. Replies

Where the answer did not contain a counterclaim, denominated as such, and the trial court did not order a reply, it was held that the court did not err in overruling the motion of the defendant for a judgment on the pleadings, predicated on the failure of the plaintiffs to file a reply to the defendant's answer.<sup>9</sup>

## II. CONSOLIDATION OF ACTIONS

A determination of motions for the consolidation of actions requires the exercise of a sound judicial discretion on the part of the trial court.<sup>10</sup>

## III. DIRECTION OF VERDICTS

It has been decided that a court cannot direct a verdict for a party having the burden of proof on an issue, where the evidence on that issue

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4. *Bailey v. Bailey*, 317 S.W.2d 630 (St. L. Ct. App. 1958).

5. *Wabash R.R. v. Berg*, 318 S.W.2d 504 (St. L. Ct. App. 1958).

6. § 509.420, RSMo 1949.

7. *Rape v. Mid-Continent Bldg. Co.*, 318 S.W.2d 519 (K.C. Ct. App. 1958).

8. *Ibid.*

9. 316 S.W.2d 883 (Spr. Ct. App. 1958).

10. *State ex rel. Rosen v. McLaughlin*, 318 S.W.2d 181 (Mo. 1958) (en banc).

is verbal, because the party having such a burden has the risk of non-persuasion of the jury on such issue, and the evidence offered in support of the issue may not be believed by the jury.<sup>11</sup>

The writer doubts that this rule should always apply. Might there not be a case where the truth of the evidence would be unquestionable?

#### IV. MOTION FOR NEW TRIAL

Where a motion for a new trial was ruled on more than thirty days after the judgment in the case, the trial court could not order a new trial on its own initiative or on any ground not specified in the motion.<sup>12</sup>

Where a trial court specified certain grounds for sustaining a motion for a new trial, the presumption is that all grounds set out by the movant as proper bases for the granting of the motion, which were not specified by the court, were overruled.<sup>13</sup>

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11. *King v. Furry*, 317 S.W.2d 690 (St. L. Ct. App. 1958).

12. *Loveless v. Locke Distrib. Co.*, 313 S.W.2d 24 (Mo 1958).

13. *Ibid.*